A **AIR EXPRESS INTERNATIONAL (M) SDN BHD**

v.

MISC AGENCIES SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL NO: D4-22-882-2003]
8 JANUARY 2008

C ***CIVIL PROCEDURE:*** *Declaration - Application for - Payment via banker's cheque a valid payment by plaintiff for import duty to customs - Whether defendant had fraudulently used plaintiff's cheque instead - Whether payment occurred when banker's cheque in possession of Customs Department - Whether error could have been on the part of the Customs* D *Department - Customs Department not made a party - Whether there were grounds to make orders at plaintiff's instance*

CUSTOMS & EXCISE: *Customs duties - Payment of - Application for declaration that payment via banker's cheque a valid payment by* E *plaintiff for import duty to customs - Whether defendant had fraudulently used plaintiff's cheque instead - Whether payment occurred when banker's cheque in possession of Customs Department - Whether error could have been on the part of the Customs Department - Customs Department not made a party - Whether there were grounds to make orders at plaintiff's* F *instance*

The plaintiff, having made a declaration to the customs on the Customs K1 Form No W11103021323 dated 26 March 1998 for a consignment on behalf of its client Ericsson Telecommunications Sdn Bhd wherein the import duty was RM93,813.24, had on 30 G March 1998 instructed its bank, Malayan Banking Berhad ('MBB') to issue a banker's cheque payable to 'Pengarah Kastam Negeri Subang', which was accordingly issued. The plaintiff, believing that it had paid the said import duty to the customs, had taken out the consignment and delivered to its client. Nearly a year later, on H 16 March 1999, the plaintiff was informed by the Customs Preventive Officer, one Saleh Majid (PW2) that the import duty payable on the plaintiff's K1 form had not been paid as yet. Upon investigation, it was found that the said banker's cheque bearing the number 213709 had been paid to the Pengarah Kastam I Negeri Subang. On the back portion of the said banker's cheque were endorsed four receipt numbers, which were receipts corresponding to K1 forms filed by the defendant. The customs

duties were paid by the defendant in respect of imports by its client, Tenaga Nasional Berhad. The plaintiff commenced this action to obtain, *inter alia*, a declaration that the payment *via* banker's cheque number 213709 amounting to RM93,813.24 was a valid payment by the plaintiff for import duty. The plaintiff argued that by the fact of the endorsements of receipt numbers on the back of the said banker's cheque, the plaintiff had discharged the heavy burden upon it of proving that the defendant had fraudulently and dishonestly used the plaintiff's said banker's cheque to pay for the custom duties payable by the defendant. The defendant argued, *inter alia,* that the defendant did not have knowledge about the use of the plaintiff's said banker's cheque and that the findings by the Custom's investigation did not say that the defendant had used the plaintiff's said banker's cheque illegally, wrongfully and/or fraudulently.

Held (dismissing plaintiff's claim):

(1) Since the plaintiff obtained customs clearance on 30 March 1998, its banker's cheque must have been with the Customs Department, and if applied to payment on other accounts on 27 April 1998, it could only occur when the banker's cheque was with the Customs Department. Although the defendant appear to have benefited from the plaintiff's banker's cheque, the question remained open whether the wrongful and/or fraudulent use was by the defendant or the Customs Department. It was at least equally probable the error was in the Customs Department, in which case there was no ground to make orders at the plaintiff's instance. Although the plaintiff's prayers had also sought orders against the Customs Department, the Customs Department had not been made a party and the latter had not had the opportunity to defend itself against any order that might be made against it. No order may be made against the Customs Department also. (paras 21 & 22)

[No order as to costs.]

For the plaintiff - Mokhzani Harris Yusof (R Subitra with him); M/s Surend Mokhzani & Partners

For the defendant - KW Moh (Aznim Azhar, Wasdi Mohamad, Hazrinna Hussain & Roszimah Jamrus with him); M/s Tengku Mohamad & Alan Lim

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Wahab Patail J:

B **[1]** Having made a declaration to the customs on the Customs K1 Form No. W11103021323 dated 26 March 1998 for a consignment on behalf of its client Ericsson Telecommunications Sdn. Bhd. wherein the import duty was RM93,813.24, the plaintiff had on or about 30 March 1998 instructed its bank, Malayan Banking Berhad ("MBB"), to issue a banker's cheque payable to C "Pengarah Kastam Negeri Subang". MBB accordingly issued the said banker's cheque bearing the number 213709 for the sum of RM93,813.24 payable to "Pengarah Kastam Negeri Subang".

[2] Believing that it had paid the said import duty to the customs, as it was endorsed on the said K1 form as having been D paid, the plaintiff had taken out the consignment and delivered it to its client.

[3] Nearly a year later, on or about 16 March 1999, the plaintiff was informed by the Customs Preventive Officer, Encik Saleh A. E Majid (PW2) that the import duty payable on the plaintiff's K1 form had not been paid as yet.

[4] Upon investigation, it was found that the said banker's cheque bearing the number 213709 had been paid to the F Pengarah Kastam Negeri Subang. The defendant had filed two declarations under K1 forms numbered 10306382 dated 17 March 1998 and 10306377 dated 17 March 1998 for the sums of RM32,578.43 and RM8,360.82. These were endorsed with receipt numbers IM013002 and IM013003 as evidencing payment. The G said banker's cheque bearing the number 213709 was used to pay the sum due of RM40,939.25.

[5] On the back portion of the said banker's cheque were endorsed four receipt numbers 050213IM, 050214IM, 050215IM and 050216IM, which are receipts corresponding to K1 forms filed H by the defendant bearing the numbers W11103017271 dated 23 March 1998, W11104008511 dated 9 April 1998, W11104016019 dated 15 April 1998 and W11104023269 dated 23 April 1998 for the sums of RM28,557.92, RM11,099.44, RM11,416.96 and RM1,796.29 respectively, totaling RM52,870.61. The balance of I RM3.38 would have been returned to the defendant in cash. The customs duties were paid by the defendant in respect of imports by its client, Tenaga Nasional Berhad.

[6] The plaintiff commenced this action to obtain the following orders against the defendant:

a) Satu perisytiharan bahawa pembayaran melalui banker's cheque bernombor 213709 sebanyak RM93,813.24 adalah satu pembayaran sah oleh plaintif bagi bayaran duti import dan cukai jualan bagi Borang Kastam (K1) Nombor Pendaftaran W11103021323;

b) Secara alternatifnya, defendan membayar kepada plaintif jumlah wang sebanyak RM93,813.24 sebagai gantirugi bagi pembayaran yang telah digunakan oleh defendan melalui banker's cheque plaintif bernombor 213709;

c) Bahawa pihak Jabatan Kastam Diraja Malaysia membuat tindakan pembetulan sewajarnya terhadap pembayaran duti konsignment plaintif, iaitu dengan mengkreditkan jumlah RM93,813.24 terhadap Borang Kastam (K1) Plaintif No. Pendaftaran W11103021323;

d) Kos tindakan ini ditanggung oleh defendan dan dibayar kepada plaintif;

e) Gantirugi am yang akan ditaksirkan; dan

f) Lain lain perintah dan/atau relif lain yang difikirkan sesuai dan berpatutan oleh Mahkamah Yang Mulia ini.

[7] Counsel for the plaintiff argued that by the fact of the endorsements of receipt numbers on the back of the said banker's cheque, the plaintiff had discharged the heavy burden upon it of proving that the defendant had fraudulently and dishonestly used the plaintiff's said banker's cheque to pay for the customs duties payable by the defendant.

[8] Counsel for the defendant, *inter alia*, argued that:

a) the defendant did not dispute the facts as summarised above;

b) the defendant did not have knowledge about the use of the plaintiff's said banker's cheque and of the plaintiff being informed that their import duty had not been paid; and

c) as far as the defendant is aware, the findings by the customs' investigation did not say that the defendant had used the plaintiff's said banker's cheque illegally, wrongfully and/or fraudulently.

[9] Counsel for the defendant submitted that the fact the plaintiff suffered loss does not lead to the conclusion there was fraud, and even though the evidence showed that the said banker's cheque was used to pay for the plaintiff's client's import duties, there is no evidence how the said banker's cheque came to be used by the defendant. He argued that plaintiff's submission that the numbers endorsed at the back of the said banker's cheque corresponded with four of the defendant's K1 forms is inaccurate upon the grounds that:

(a) The receipt numbers printed upon the form K1 and date of payment was not clear;

(b) The receipt number on the K1 form at p. 9 of common bundle B is not 050214IM but 0214;

(c) The date of payment of the K1 form at p. 11 of common bundle B cannot be confirmed;

(d) The registration numbers of form K1 at p 5, 9, 11 and 15 are in fact not the same as in the Audit Roll:

Form K1 No.	**Number in Audit Roll**
W11103017271	W11-9803-017271
W11104008511	W11-9804-008511
W11104016019	W11-9804-016019
W11104023269	W11-9804-023269

(e) The numbers endorsed at the back of the said banker's cheque are not clear.

[10] Counsel for the defendant argued that the registration numbers of the K1 forms at pp. 1 and 3 of common bundle B are not the same as the registration numbers in the Audit Roll:

Form K1 No.	**Number in Audit Roll**
10306382	0030638200-1W111
10306377	0030637700-02W11

[11] Counsel for the defendant submitted since the customs cheque payment' books did not show any cheque number 213709 from the defendant on 27 April 1998, there is no proof that the defendant used the said banker's cheque.

[12] Further, he argued that SP2's testimony that entry in red ink was used to denote refunds, should be examined carefully because:

(a) The name of MISC was recorded as "PEMBAYAR" for the sum of RM3.38 and not as "PENERIMA";

(b) The record was made by the customs finance officers and not SP2.

[13] And finally argued, in his own words, as follows:

(a) Di kaki m/s 3 bundle "B2" telah dicatitkan jumlah kutipan keseluruhan pada tarikh 27 April 1998 untuk Giliran 11B:

i) Jumlah RM34,029.56 yang tercatit di situ merupakan keseluruhan jumlah kutipan tunai;

ii) Jumlah RM381,664.65 untuk kutipan cek yang terdiri daripada sub-total RM206,516.60 dan sub-total RM175,148.05 yang tertulis di baris ke-2 dan terakhir ruang ("column") ke-2 di bawah kepala "Cek-cek Bank Tempatan;

iii) Jumlah RM25,299.66 untuk kutipan RHB Tempatan di sebelah ruangan "Tunai" di m/s 2;

iv) Jumlah RM27,369.07 untuk kutipan E.F.T.

(b) Jika dikira kutipan tunai di m/s 2 (termasuk jumlah RM3.38 itu, kesemuanya baru berjumlah RM33,082.70 sedangkan jumlah keseluruhan kutipan tunai yang diringkaskan di m/s 3 adalah RM34,029.56. Justeru itu, "benefit of the doubt" boleh diberikan kepada MISC untuk mengatakan bahawa jumlah RM3.38 itu telah diterima oleh pihak Kastam daripada MISC bukan sebaliknya.

[14] It is clear from the evidence before the court that the plaintiff commenced its claim after it obtained a copy of the plaintiff's said banker's cheque upon which was endorsed the K1 registration numbers of the defendant and the name of the defendant, the payer and his NRIC number, and after the Customs Department informed the plaintiff that the defendant had wrongfully and/or fraudulently used the plaintiff's said banker's cheque to pay the defendant's client's import duties.

[15] As illustrated by the submissions made on behalf of the defendant and summarised above, the defence resorted to various arguments to avoid being held responsible, including maintaining questions upon petty differences which had been explained away during cross-examination of the relevant witness from the Customs Department. In the smokescreen of arguments put up, what remained unanswered is how the plaintiff's said banker's cheque was used to pay the customs duties due on other K1 forms filed by the defendant.

[16] It is clear that the banker's cheque bearing the number 213709 was issued by the plaintiff's bankers, Malayan Banking Berhad for the sum of RM93,813.24 payable to "Pengarah Kastam Negeri Subang". The sum of RM93,813.24 is identical to the import duty payable of RM93,813.24 as shown on the Customs Kl Form No. W11103021323 dated 26 March 1998 for a consignment on behalf of the plaintiff's client, Ericsson Telecommunications Sdn. Bhd. The said banker's cheque, for the purpose of obtaining customs clearance to take out the consignment belonging to the plaintiff's client, Ericsson Telecommunications Sdn. Bhd., would in the ordinary course have been handed to the Customs Department. The banker's cheque was issued on 30 March 1998. It is endorsed on the K1 form filed by the plaintiff that customs clearance was issued on 30 March 1998. The consignment could not have been released unless the customs duty had been paid.

[17] But, it appears the said banker's cheque was deposited into the Pengarah Kastam Negeri L.T.A. Subang account on 29 April 1998. It also appears it was used to pay for the customs duties payable upon K1 declarations made by the defendant for its client, Tenaga Nasional Berhad.

[18] Both the plaintiff and the defendant are in a similar business with respect to the Customs Department. It is to deal with customs clearances on behalf of their respective clients. It is inconceivable that the plaintiff would give the said banker's cheque to be used by the defendant to pay for customs duties for the defendant's client. There is no evidence before the court how the defendant obtained the said banker's cheque.

[19] The issue of customs clearance on 30 March 1998 would show that the said banker's cheque was used on 30 March 1998 for payment of customs duties to its full face value. The said banker's cheque would have been with the Customs Department from 30 March 1998. The endorsements show the said banker's cheque was used to pay the defendant's clients' customs duties. These endorsements were for K1 forms dated 23 March 1998 to 23 April 1998. Other records show the balance amount of the value of the said banker's cheque were applied to payments on two other K1 declarations both dated 17 March 1998. Inspection of the six K1 declaration forms show that customs clearance was given on 27 April 1998. This is two days before the said banker's cheque was paid into the Pengarah Kastam Negeri L.T.A. Subang account at RHB Bank.

[20] For its part the defendant showed that two Malayan Banking Berhad Banker's Cheques for the sums of RM32,578.43 and RM8,360.62 were issued on 24 April 1998, and its bank statement also shows debits of RM32,580.43 and RM8,362.82 on 24 April 1998. There were also debits on the same day of RM28,559.92, RM11,101.42, as well as of RM1,798.29, but there were no corresponding banker's cheques shown. Nor is there any evidence shown whether the two banker's cheques were in fact credited into the Pengarah Kastam accounts.

[21] Since the plaintiff obtained customs clearance on 30 March 1998, its banker's cheque must have been with the Customs Department, and if applied to payment on other accounts on 27 April 1998, it could only occur when the banker's cheque is with the Customs Department.

[22] Although the defendant appear to have benefited from the plaintiff's banker's cheque, the question remains open whether the wrongful and/or fraudulent use was by the defendant or the Customs Department. It is at least equally probable the error was

in the Customs Department, in which case there is no ground to make orders at the plaintiff's instance. Although the plaintiff's prayers had also sought orders against the Customs Department, the Customs Department had not been made a party and the latter had not had the opportunity to defend itself against any order that might be made against it. No order may be made against the Customs Department also.

[23] Plaintiff's claim is, therefore, dismissed.

[24] But clearly the defendant benefited from the plaintiff's banker's cheque, and since in these circumstances it had not shown it has itself paid, the court will not make an order of costs in its favour. There is, therefore, no order as to costs.